Office - Supreme Court, U.S.
FILED
JUN 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1256

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

DENNIS LYNCH, ET AL., PETITIONERS

*v.*

DANIEL DONNELLY, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

---

REX E. LEE
*Solicitor General*

J. PAUL MCGRATH
*Assistant Attorney General*

PAUL M. BATOR
*Deputy Solicitor General*

CAROLYN B. KUHL
*Deputy Assistant Attorney General*

KATHRYN A. OBERLY
*Assistant to the Solicitor General*

WILLIAM G. COLE
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a municipality's inclusion of a nativity scene in an annual traditional Christmas celebration violates the Establishment Clause of the First Amendment to the United States Constitution.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Introduction and summary of argument | 2 |
| Argument: | |
| The Establishment Clause of the First Amendment was not intended to prohibit governmental acknowledgment of religion as a part of our Nation's heritage | 4 |
| A. The historical evidence shows that the Establishment Clause of the First Amendment was not intended to exclude religion from our public occasions | 4 |
| B. This Court's Establishment Clause decisions do not forbid the government to acknowledge our religious heritage | 15 |
| Conclusion | 27 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Abington School District* v. *Schempp*, 374 U.S. 203 | 15, 16, 17, 18 |
| *ACLU* v. *Rabun County*, 698 F.2d 1098 | 22 |
| *Allen* v. *Hickel*, 424 F.2d 944 | 2, 14 |
| *Allen* v. *Morton*, 495 F.2d 65 | 2, 23 |
| *Aronow* v. *United States*, 432 F.2d 242 | 11 |
| *Boyd* v. *United States*, 116 U.S. 616 | 10 |
| *California* v. *Sierra Club*, 451 U.S. 287 | 24 |
| *Cantwell* v. *Connecticut*, 310 U.S. 296 | 6 |
| *Citizens Concerned for Separation of Church & State* v. *City & County of Denver*, 526 F. Supp. 1310 | 23 |
| *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 | 4, 18 |
| *Engel* v. *Vitale*, 370 U.S. 421 | 15, 16 |
| *Everson* v. *Board of Education*, 330 U.S. 1 | 4, 5 |

Cases—Continued: Page

*Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 ..... 9, 16, 18, 20
*Jackman* v. *Rosenbaum Co.*, 260 U.S. 22 ..... 15
*Larson* v. *Valente*, 456 U.S. 228 ..... 3, 20, 21
*Lemon* v. *Kurtzman*, 403 U.S. 602 ..... 3, 23, 26
*McGowan* v. *Maryland*, 366 U.S. 420 ..... 4, 6
*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 ..... 24
*Myers* v. *United States*, 272 U.S. 52 ..... 10
*New York Trust Co.* v. *Eisner*, 256 U.S. 345 ..... 4
*O'Hair* v. *Andrus*, 613 F.2d 931 ..... 24
*Stone* v. *Graham*, 449 U.S. 39 ..... 17
*United States* v. *Ramsey*, 431 U.S. 606 ..... 10
*United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983) ..... 10
*Walz* v. *Tax Commission*, 397 U.S. 664 ..... 4, 15, 17, 18, 19
*Widmar* v. *Vincent*, 454 U.S. 263 ..... 24
*Wolman* v. *Walter*, 433 U.S. 229 ..... 20
*Zorach* v. *Clauson*, 343 U.S. 306 ..... 3, 6, 15, 18-19

Constitution, statutes and regulation:

United States Constitution:
Amend. I ..... 2, 3, 5, 6, 8, 9, 19
Establishment Clause ..... 1, 3, 4, 6, 9, 10, 15, 20, 24
Free Exercise Clause ..... 4
Amend. XIV (Due Process Clause) ..... 6
Act of Sept. 22, 1789, ch. 17, Section 4, 1 Stat. 71.. 8
5 U.S.C. (& Supp. V) 6103 ..... 1
31 U.S.C. 324a ..... 11
36 U.S.C. 169g ..... 11
36 U.S.C. 169h ..... 11
36 U.S.C. 170 ..... 12
36 U.S.C. 172 ..... 11-12
36 U.S.C. 186 ..... 11
Pub. L. No. 97-280, 96 Stat. 1211 ..... 13
36 C.F.R. 50.19 ..... 23

Miscellaneous: Page

W. Berns, *The First Amendment and the Future of American Democracy* (1976) ..... 9
1 Cong. Deb. (1834):
p. 757 ..... 5
pp. 757-760 ..... 5
5 J. Elliot, *Debates on the Adoption of The Federal Constitution* (2d ed. 1836) ..... 7-8
Griswold, *Absolute Is In The Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167 (1963) ..... 16
H.R. Rep. No. 1693, 83d Cong. ,2d Sess. (1954).... 12
H.R. Rep. No. 1959, 84th Cong., 2d Sess. (1956).... 11, 25
1 Journals of the Continental Congress (1774):
p. 26 ..... 7
2 Journals of the Continental Congress (1775):
p. 12 ..... 7
p. 13 ..... 7
5 Journals of the Continental Congress 530 (1776) ..... 7
6 Journals of the Continental Congress 1034 (1776) ..... 7
27 Journals of the Continental Congress 683 (1784) ..... 7
1 Journal of the House of Representatives, 1st Cong., 1st Sess. (1789) ..... 8
1 Journal of the Senate, 1st Cong., 1st Sess. (1789) ..... 8
W. Moberly, *The Crisis in the University* (1949).. 19
R. Morgan, *The Supreme Court and Religion* (1972) ..... 17
Proclamation No. 2629, 9 Fed. Reg. 13099 (1944).. 13
Proclamation No. 4844, 45 Fed. Reg. 25077 (1981).. 13
Proclamation No. 4853, 46 Fed. Reg. 56153 (1981).. 12
Proclamation No. 5018, 48 Fed. Reg. 5527 (1983).. 13
*Remarks Before Lighting the National Community Christmas Tree*, 3 Weekly Comp. Pres. Doc. 1730 (Dec. 15, 1967) ..... 14

Miscellaneous—Continued: Page

*Remarks on Lighting the National Community Christmas Tree*, 16 Weekly Comp. Pres. Doc. 2817 (Dec. 18, 1980) ..... 14
*Remarks on Lighting the National Community Christmas Tree*, 17 Weekly Comp. Pres. Doc. 1386 (Dec. 17, 1981) ..... 14
1 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (1896-1899) ..... 9
3 A. Stokes, *Church and State in the United States* (1950) ..... 12
A. Stokes & L. Pfeffer, *Church and State in the United States* (rev. 1st ed. 1964) ..... 8, 9
3 J. Story, *Commentaries on the Constitution of the United States* (1833) ..... 6, 10
17 Weekly Comp. Pres. Doc. 1058 (Sept. 29, 1981) .. 13
19 *The Writings of Thomas Jefferson* (Memorial ed. 1904) ..... 9

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-1256

DENNIS LYNCH, ET AL., PETITIONERS

*v.*

DANIEL DONNELLY, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

---

### INTEREST OF THE UNITED STATES

The City of Pawtucket, Rhode Island, has, for the past 40 years, included a small nativity scene as part of an elaborate annual display connected with the celebration of Christmas. The courts below held that the City's practice violates the Establishment Clause of the First Amendment to the United States Constitution. The United States has a substantial interest in this matter, which raises the question whether the Constitution requires us rigidly to exclude from our public ceremonies and celebrations all acknowledgments of the religious elements in our national traditions.

The United States, like the City of Pawtucket and countless other state and local governments, has long participated in the celebration of the Christmas season. Congress has declared Christmas to be a national holiday (5 U.S.C. (& Supp. V) 6103), and the

United States has in past years sponsored Christmas pageants that included nativity scenes. See *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). Since the days of the Pilgrims, we have devoted, as a Nation, one day every year to giving thanks to God. More broadly, the federal government has, from the earliest days of the Republic to the present, felt free to acknowledge and recognize that religion is a part of our heritage and should continue to be an element in our public life and public occasions. The United States has a deep and abiding interest in maintaining this long-standing tradition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Woodenly applying legal tests devised for different situations, the court of appeals here invalidated a traditional form of public celebration, one that cannot sensibly be perceived as a serious threat to the fundamental values protected by the First Amendment. Our submission is that it was not the purpose of the Framers of the Constitution to require government wholly and rigidly to exclude religion from our public occasions. Indeed, this Court has long assumed that traditional acknowledgments of the religious elements of our heritage fit comfortably within the zone of permissible governmental interaction with religion. A contrary conclusion, such as that reached by the court of appeals, does not further the principles of the First Amendment. Instead, it mandates an artificial and undesirable sterility in public life, in which one important and enriching aspect of our history and culture is treated as illegitimate and therefore nonexistent. Excising religion from our public commemorations is not only not required by the Constitution, but runs counter to this Court's teachings that government should "accommodate[]

the public service to [our people's] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

In our view, the court of appeals erred in its assumption that Establishment Clause doctrines developed by this Court in other contexts must be mechanistically applied to the very different question presented by this case. The "strict scrutiny" test enunciated in *Larson* v. *Valente*, 456 U.S. 228 (1982), and applied by the court of appeals in this case, was conceived in the context of a state statute that placed onerous legal obligations on "unpopular" religious denominations. The inclusion of a traditional nativity scene in a large civic display, designed to provide public participation in the celebration of the Christmas holiday, is not such a religious preference at all; it is simply a natural acknowledgment of the fact that the holiday includes a religious aspect.

The familiar three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), also seems inapposite and artificial here—although petitioners' brief shows that Pawtucket's practice does meet that test. The traditional religious references and reminders that fill American public life should not depend, for their validity, on the dubious assertion that they are wholly perfunctory and meaningless. It was never the purpose of the Framers to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character. We therefore ask the Court to rule that the First Amendment does not mandate the contrived exclusion of religion from our public life exemplified by the opinion of the court of appeals, holding that, if government is to participate in commemorating Christmas at all, it must somehow ignore or conceal the holiday's religious significance.

## ARGUMENT

### THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT WAS NOT INTENDED TO PROHIBIT GOVERNMENTAL ACKNOWLEDGMENT OF RELIGION AS A PART OF OUR NATION'S HERITAGE

#### A. The Historical Evidence Shows That The Establishment Clause Of The First Amendment Was Not Intended To Exclude Religion From Our Public Occasions

1. This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). See also *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676 (1970). The Court has been sensitive to the fact that history sheds light on the meaning of the Establishment and Free Exercise Clauses and their application to particular circumstances; it has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*" (397 U.S. at 671; emphasis added). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) (history of Sunday Closing Laws relevant to Establishment Clause inquiry); *Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947) (history of period when Establishment Clause was fashioned and adopted is relevant to determination of validity of modern state law authorizing reimbursement for student transportation to private schools).

What was the Framers' purpose in providing that "Congress shall make no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof * * *" ? At the time the amendment reached the floor of the House of Representatives, it read: "[N]o religion shall be established by law nor shall the equal rights of conscience be infringed." 1 Cong. Deb. 757 (1834) (hereinafter cited as "Debates"). This language prompted concern among some representatives that the amendment would prohibit nondiscriminatory state aid to religion; others read it as perhaps suggesting an even broader prohibition.[1] James Madison, who played a leading role in the drafting and adoption of the First Amendment,[2] sought to quiet such concerns by explaining (1 Debates 757) that:

> [H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

During the course of debate, the language of the amendment was changed to its current form. See *Everson* v. *Board of Education, supra*, 330 U.S. at 39 n.27 (Rutledge, J., dissenting). Throughout the debates, however, Congress adhered to the central purposes set forth by Madison: Congress may not es-

---

[1] 1 Debates 757-760. One representative voiced a fear that such language "might be thought to have a tendency to abolish religion altogether" (*id.* at 757). Another expressed concern that "the words might be taken in such latitude as to be extremely hurtful to the cause of religion" (*ibid.*).

[2] See, *e.g.*, *Everson* v. *Board of Education, supra*, 330 U.S. at 13; *id.* at 28, 31-43 (Rutledge, J., dissenting).

tablish a national church, may not prefer one sect over another, and may not compel worship contrary to conscience. See 3 J. Story, *Commentaries on the Constitution of the United States* § 1871 (1833).[3]

On the other hand, there is no evidence whatever that the Framers contemplated a contrived exclusion of religion from our public life or sought to disable the State from acknowledging that religion is an important part of our heritage. As the Court correctly observed in *Zorach* v. *Clauson*, *supra*, 343 U.S. at 312, "[t]he First Amendment * * * does not say that in every and all respects there shall be a separation of Church and State." Nor was the Establishment Clause so understood by the Framers themselves.

2. Both before and after the drafting and enactment of the Establishment Clause, governmental acknowledgment of a Supreme Being was a naturally accepted feature of American public life. Government officials invoked the name of God, asked His blessings upon our Nation, and encouraged our people to do the same. The Declaration of Independence, now enshrined in the National Archives, proclaims it "self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights * * *." The Republic was established, the authors of the Declaration wrote, "appealing to the

---

[3] Congress also intended to prohibit the federal government from interfering with the various established state religions existing at the time of ratification of the First Amendment. See *McGowan* v. *Maryland*, *supra*, 366 U.S. at 440-441. Nevertheless, the provisions of the First Amendment have since been made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

Supreme Judge of the world for the rectitude of our intentions" and "with a firm reliance on the Protection of Divine Providence * * *."

In September 1774, the delegates to the first session of the Continental Congress resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited clergyman—the Reverend Jacob Duché. 1 Journals of the Continental Congress 26 (1774) (hereinafter cited as "Journals"). Reverend Duché continued to deliver prayers to the Continental Congress during the following two years. See 2 Journals 12, 13 (1775); 5 Journals 530 (1776). When he resigned from the office of Chaplain, he was succeeded by two new chaplains (6 Journals 1034 (1776)), and eight years later the Continental Congress decided that chaplains should be elected annually (27 Journals 683 (1784)).

In 1787, Benjamin Franklin, no adherent of religious orthodoxy, proposed that each day's session of the Constitutional Convention be opened with a prayer (5 J. Elliot, *Debates on the Adoption of The Federal Constitution* 254 (2d ed. 1836)):

> I have lived, sir, a long time, and, the longer I live, the more convincing proofs I see of this truth—*that God governs in the affairs of men.* * * *
>
> I therefore beg leave to move that henceforth, prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this assembly every morning * * *.[4]

---

[4] For a number of reasons, Franklin's proposal was never adopted. Among other things, the delegates were concerned about the lack of funds for a chaplain's pay and the fact that institution of a prayer practice well after the start of the Convention might be taken as a sign of desperation. See 5

When George Washington was inaugurated as our first President, he went, accompanied by both Houses of Congress, to St. Paul's Chapel in New York City for a concluding religious service conducted by the first Episcopal bishop of New York. See A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). The decision to hold the service was the product of a joint resolution adopted by both houses of Congress (*ibid.*). Similarly, the First Congress, which drafted and adopted the First Amendment, simultaneously retained chaplains to offer public prayers at the beginning of each legislative day. See 1 Journal of the Senate, 1st Cong., 1st Sess. 10 (1789); 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 11-12 (1789); Act of Sept. 22, 1789, ch. 17, Section 4, 1 Stat. 71.

Thanksgiving and fast-day proclamations also were common before and after ratification of the First Amendment. John Adams described one such fast-day proclamation in a letter to his wife, Abigail Adams (*reprinted in* A. Stokes & L. Pfeffer, *supra*, at 83):

> We have appointed a Continental fast. Millions will be upon their Knees at once before their Great Creator, imploring His forgiveness and blessing; His smiles on American Councils and arms.

The day after proposing the First Amendment, Congress called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and

---

J. Elliott, *supra*, at 253-256; A. Stokes & L. Pfeffer, *Church and State in the United States* 84 (rev. 1st ed. 1964).

signal favours of Almighty God." *Id.* at 87. The President responded by proclaiming November 26, 1789, as a day of thanksgiving on which to "offer[] our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions * * *." 1 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 64 (1896-1899). Washington continued this practice on other occasions during his Administration, see *id.* at 179-180, as did other Founding Fathers who later served as President.[8]

It thus seems obvious that the men responsible for the drafting and enactment of the Establishment Clause never contemplated that they were eradicating religious traditions from American public life. Indeed, Story stated that at the time of the adoption of the First Amendment, "[a]n attempt to level all religions, and to make it a matter of state policy to

---

[8] John Adams issued at least two thanksgiving proclamations and James Madison issued at least four. See 1 J. Richardson, *supra*, at 268-270, 284-286, 513, 532-533, 558, 560-561. Thomas Jefferson thought such proclamations would violate the Constitution and did not issue any. See A. Stokes & L. Pfeffer, *supra*, at 88. Nonetheless, Jefferson later encouraged the establishment of denominational schools of religion on or adjacent to the public University of Virginia campus which would "offer the * * * advantage of enabling the students of the University to attend religious exercises * * *." 19 *The Writings of Thomas Jefferson* 415 (Memorial ed. 1904). Jefferson also wrote: "And can the liberties of a Nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" *Reprinted in* W. Berns, *The First Amendment and the Future of American Democracy* 13-14 (1976). See also *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 246-247 (1948) (Reed, J., dissenting).

hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 3 J. Story, *Commentaries on the Constitution of the United States*, *supra*, at § 1868.

The words and actions of the Founding Fathers and the First Congress are, of course, of special significance. This Court has observed that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). Accord *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 6-7; *United States* v. *Ramsey*, 431 U.S. 606, 616-617 (1977); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). As the Court went on to say in *Myers* (272 U.S. at 175):

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

There is no good reason to depart from this wise principle in this case. The Framers of the Establishment Clause obviously thought it both natural and constitutional for government to acknowledge our religious heritage and participate in celebrations that include a religious element. Although Christmas itself was not widely celebrated in this country before the 1800's and did not become a national holiday until 1870 (see Pet. App. A15 to A16), the Framers clearly participated in the official and public celebration of Thanksgiving—a day dedicated, after all, to

the giving of thanks to God. The creation and maintenance of legislative chaplaincies, and the frequent invocation of God's blessing on all of the Nation's public and ceremonial occasions, also demonstrate that the Framers would have been confounded and astonished by the suggestion that government is not free to acknowledge and help commemorate an occasion such as Christmas or that, in doing so, it must somehow contrive to conceal and ignore the holiday's religious aspects.

3. Today, as in the earliest days of the Republic, the government continues to recognize that our Nation's heritage includes a religious element. Coins have borne the legend "In God we trust" since 1865 (31 U.S.C. 324a), and this phrase was made the national motto in 1956 (36 U.S.C. 186).[4] The House Report stated (H.R. Rep. No. 1959, 84th Cong., 2d Sess. 2 (1956)): "It will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality * * *." In 1950, Congress designated Memorial Day as a day of "prayer for a permanent peace" (36 U.S.C. 169g). In 1952, Congress directed the President to proclaim a National Day of Prayer each year (36 U.S.C. 169h). In 1954, Congress added the words "under God" to the Pledge of Allegiance (36

---

[4] The constitutionality of the use of this phrase was upheld in *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970). The court explained (*id.* at 243) that:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

U.S.C. 172). The House Judiciary Committee explained that the words were added to acknowledge our religious heritage (H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954)):

> This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs.

Many patriotic songs similarly acknowledge our dependence upon God and invoke His blessings. One stanza from the National Anthem (36 U.S.C. 170) includes the phrases, "May the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation" and "this be our motto, 'In God is our Trust.'" The fourth stanza of "America" proclaims:

> Our fathers' God, to Thee, Author of Liberty, to Thee we sing.
> Long may our Land be bright with freedom's holy light,
> Protect us by Thy might, great God our King.

As in Washington's day, Presidential proclamations and messages continue to mark Thanksgiving as a day of prayer.[7] These Presidential proclamations invoke the religious aspects of our national heritage without embarrassment. President Roosevelt's 1944 Thanksgiving Day Proclamation offers a partic-

---

[7] See, *e.g.*, Proclamation No. 4883, 46 Fed. Reg. 56153 (1981) (Thanksgiving Day, 1981). Virtually every President since Washington has proclaimed a national day of prayer and thanksgiving. See 3 A. Stokes, *Church and State in the United States* 180-126 (1950).

ularly vivid example (Proclamation No. 2629, 9 Fed. Reg. 13099 (1944)):

> [I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands.
>
> * * * * *
>
> To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas. Let every man of every creed go to his own version of the Scriptures for a renewed and strengthening contact with these eternal truths and majestic principles which have inspired such measure of true greatness as this nation has achieved.

Presidential proclamations and messages also have issued to commemorate Jewish Heritage Week (Proclamation No. 4844, 46 Fed. Reg. 25077 (1981)) and the Jewish High Holy Days (17 Weekly Comp. Pres. Doc. 1058 (Sept. 29, 1981)). Congress recently called upon the President to proclaim 1983 as the " 'Year of the Bible' in recognition of both the formative influence the Bible has been for our Nation, and our national need to study and apply the teachings of the Holy Scriptures" (Pub. L. No. 97-280, 96 Stat. 1211). On February 3, 1983, the President did in fact proclaim 1983 to be the "Year of the Bible" (Proclamation No. 5018, 48 Fed. Reg. 5527 (1983)).[8]

---

[8] Constitutional challenges to the "Year of the Bible" are pending in *Zwerling* v. *Reagan*, No. CV-83-2504-R (C.D. Cal.) and *Gaylor* v. *Reagan*, No. 83-C-985-D (W.D. Wis.).

Similarly, when Presidents make public statements in connection with the celebration of Christmas, they naturally and frequently include references to the fact that this is a religious celebration as well as a secular holiday.[9] A nativity scene has been displayed in the East Room of the White House at least since the time of the Trumans and perhaps even longer. In federally-financed chapels on military bases, in hospitals, prisons and at our Service Academies, Christmas is celebrated as a religious event for those who adhere to the Christian religion. Federally-funded museums display religious art and traditional symbols, and the Postal Service issues seasonal postage stamps that reproduce religious paintings. See *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970).

Finally, government buildings and monuments are filled with religious language and imagery, from the nearly omnipresent "Anno Domini" chiseled into cornerstones, to the depiction of the Ten Commandments in the frieze facing every lawyer who addresses this Court. Religious subjects are depicted in murals in the library and outside the Great Hall of the Department of Justice.[10]

Further elaboration is surely unnecessary; we remind the Court simply of its own well-known observa-

---

[9] See, *e.g.*, *Remarks on Lighting the National Community Christmas Tree*, 17 Weekly Comp. Pres. Doc. 1389 (Dec. 17, 1981); *Remarks on Lighting the National Community Christmas Tree*, 16 Weekly Comp. Pres. Doc. 2817 (Dec. 18, 1980); *Remarks Before Lighting the National Community Christmas Tree*, 3 Weekly Comp. Pres. Doc. 1730 (Dec. 15, 1967).

[10] Outside the Great Hall, for example, are large paintings of Jesus, of Moses with the Ten Commandments, and of Thomas Aquinas, along with portraits of secular legal luminaries such as Coke, Kent, Solon, Socrates and Holmes.

tion in *Zorach* v. *Clauson*, *supra*, 343 U.S. at 313, that "[w]e are a religious people whose institutions presuppose a Supreme Being."

### B. This Court's Establishment Clause Decisions Do Not Forbid The Government To Acknowledge Our Religious Heritage

1. As this Court has observed in an Establishment Clause context, using the words of Justice Holmes: " 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922). For this reason, no doubt, the Court has long assumed that it is valid to continue to make traditional use of religious symbols in government. For example, in *Engel* v. *Vitale*, *supra*, 370 U.S. at 435 n.21, the Court noted:

> There is of course nothing in the decision reached here that is inconsistent with the fact that * * * there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Similarly, in *Abington School District* v. *Schempp*, 374 U.S. 203, 213 (1963), the Court stated:

> This background [of the Founding Fathers' religious devotion] is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of Congress provides through its Chaplain an opening prayer, and the sessions of this Court

> are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.[11]

Commentators, too, have recognized the constitutionality of governmental celebration of our religious heritage. The point was made most vividly by Dean Erwin N. Griswold (Griswold, *Absolute Is In the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167, 174 (1963)):

> [T]o say that [the First Amendment] require[s] that all trace of religion be kept out of any sort of public activity is sheer invention. Our history is full of these traces * * *. Must all of these things be rigorously extirpated in order to satisfy a constitutional absolutism? What about Sunday? What about Christmas? Must we deny our whole heritage, our culture, the things of spirit and soul which have sustained us in the past and helped to bind us together in times of good and bad?
>
> Does our deep-seated tolerance of all religions—or, to the same extent, of no religion—require that we give up all religious observance in public activities? Why should it? It certainly never occurred to the Founders that it would.

---

[11] Individual Justices of this Court have expressed similar views in separate concurring or dissenting opinions. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 303-304 (Brennan, J., concurring); *Engel* v. *Vitale*, *supra*, 370 U.S. at 446-450 (Stewart, J., dissenting); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 253-254 (Reed, J., dissenting).

What *has* concerned the Court are those government practices that, it found, coerce religious orthodoxy or inescapably have that effect (*e.g.*, *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)). The Court has also condemned practices that it found to involve the government directly and unequivocally in religious exercises (*e.g.*, *Abington School District* v. *Schempp*, *supra*, 373 U.S. at 223-224). But for the government to participate in holiday celebrations that have religious as well as secular elements, and in that context to acknowledge our religious heritage, is not a "religious exercise," or an interference with the rights of conscience of non-believers.[12] Nor have such practices "given the remotest sign of leading to an established church or religion" (*Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678).[13] In fact it is, precisely, our tradition of toleration that suggests that government should be allowed to give some recognition to the belief of many of our people that religion should continue to play some role in our public occasions.

---

[12] Cf. R. Morgan, *The Supreme Court and Religion* 23 (1972) ("'Freedom of conscience' as used by Madison and some others referred specifically to the question whether or how one believed in God. It did not mean that the federal government could not force people to do things or pay taxes for things which offended them, only that people could not be coerced into making or contributing to any profession of belief regarding a Supreme Being").

[13] Nor is it plausible to suggest that such government celebrations are "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678). If government celebrations of our religious heritage "can be seen as the first step toward 'establishment' of religion, * * * the second step has

2. Jefferson's celebrated reference to a "wall of separation between church and State" may suggest that all of these governmental acknowledgments of religion must be condemned. But the Court has recognized that "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 760. Such "total separation" would clearly require an elaborate effort to reshape our practices and rhetoric, one that would betoken a systematic hostility to religion—in effect, the establishment of irreligion. But hostility toward religion is as prohibited by the Constitution as is governmental establishment of religion. See, *e.g.*, *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 306 (Goldberg, J., concurring); *Zorach* v. *Clauson*, *supra*, 343 U.S. at 314; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211-212 (1948).

Instead, government's proper role is one of "*benevolent* neutrality" toward religion, in which "there is room for play in the joints." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669 (emphasis added). Religion is inextricably imbedded in our national culture and our official holidays and ceremonies. It pervades our public as well as our private lives because of our history and because recognition of this aspect of our history is of deep concern to many of our people. To ignore this heritage and this deeply felt concern by eradicating all evidence of its influence would be to substitute "callous indifference" for "benevolent neutrality." *Zorach* v. *Clauson*,

---

been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits'" (*ibid.*).

*supra*, 343 U.S. at 314; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669.[14]

3. What does "benevolent neutrality" call for in the context of this case? We must recognize that Christmas has become, in part, a secular celebration. But its meaning is also religious, and it is its religious meaning that is commemorated by millions of Americans through services and through worship. Must government mark Christmas by pretending that it is *purely* secular, as required by the court of appeals? Does the Constitution require government either to cease celebrating Christmas altogether, or to make affirmative efforts to distort its participation in those celebrations by extirpating all references to the events that Christmas commemorates? In our submission, the First Amendment simply does not require such artificial bowdlerization and aesthetic impoverishment of our public life.

Moreover, the courts below certainly failed to consider the Pawtucket nativity scene in the context of its display. As demonstrated by the record (see Pet. Br. 3-5), the creche is simply one part of the

---

[14] A perceptive reminder that "neutrality" in this context is a subtle and problematical concept was provided by Sir Walter Moberly, in the context of debate over the role of religion in the English public universities (W. Moberly, *The Crisis in the University* 55-56 (1949)):

> On the fundamental religious issue [the existence of God], the modern university intends to be, supposes it is, neutral, but it is not. Certainly it neither inculcates nor expressly repudiates belief in God. But it does what is far more deadly than open rejection; it ignores Him * * *. It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary, you teach that it is to be omitted * * *. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly * * *.

City's multi-faceted Christmas display. The entire celebration combines all of the elements of a traditional American Christmas. The Constitution does not require government to excise one element or to pretend that it no longer exists. As Judge Campbell recognized in dissent (Pet. App. A19):

> It seems a little like maintaining a holiday known as "Washington's Birthday" while extirpating all reference to George Washington. Christmas, so long as called by that name, inescapably recalls the birth of the founder of Christianity. To "save" it by pretending to the contrary has an almost Orwellian twist. I do not think that constitutional values are furthered by this kind of thinking.

4. We believe that the court of appeals was led astray by its assumption that doctrinal formulations developed by this Court in other contexts must be woodenly applied in all Establishment Clause cases. Justice Powell reminded us in *Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part), that "analytical tidiness" must sometimes be sacrificed in order to avoid "blind absolutism." Similarly, Justice Reed observed that "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *Illinois ex rel McCollum* v. *Board of Education*, *supra*, 333 U.S. at 256 (Reed, J., dissenting).

a. In its zeal for "analytical tidiness," the court of appeals concluded (Pet. App. A11) that it was bound to review the practice challenged in this case under the "strict scrutiny" test enunciated in *Larson* v. *Valente*, 456 U.S. 228 (1982). That test was

formulated in the context of a state statute that imposed onerous legal obligations on some religions but not on others; the Court stated that the statute "clearly grant[ed] denominational preferences of the sort consistently and firmly deprecated in [the Court's] precedents." *Larson* v. *Valente*, *supra*, 456 U.S. at 246 (footnote omitted).[15] We believe that the inclusion of a manger scene as part of a large traditional civic display is not a "denominational preference" at all and that application of the *Larson* "strict scrutiny" test in this situation is confusing and inapposite. To recognize that Christmas has something to do with the birth of Christ is not to "prefer" Christianity over other religions, but simply to acknowledge its constituent meaning. To state that government may not prefer one religion over another does not mean that government must pretend that religious holidays have no specific meanings to different religions.[16] Religious pluralism does not require gov-

---

[15] *Larson* involved a Minnesota statute granting preferential treatment to the well-established churches that receive more than half of their charitable contributions from their members. Other, less entrenched religious organizations were to be subjected to various registration and reporting requirements. In striking down the statute, the Court noted that the law "was drafted with the explicit intention of including particular religious denominations and excluding others" (456 U.S. at 254). One state senator explained that " 'what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations' " (*ibid.*, quoting legislative history on file with the Court).

[16] A nativity scene of course acknowledges Christian traditions that are not shared by all religions. But that result is inescapable once we decide that government may participate at all in the commemoration of Christmas. It is simply not

ernment to establish an official, homogenized, all-purpose form of religion of its own. By its ceremonial participation in the celebration of a Christian holiday, government does not "establish" Christianity and does not discriminate against other religions. It certainly does not act in any way to disfavor unpopular or unconventional religious views—the vice perceived by the Court in *Larson*. The *Larson* analysis should not be extended to wholly dissimilar situations posing no comparable threat to religious pluralism.[17]

b. The practice challenged in this case could be analyzed under the Court's now familiar three-part test, which requires that governmental action (1)

---

possible for government to give uniform recognition to all religions in the context of commemorating one religion's particular holiday. By analogy, the court of appeals would presumably invalidate government's recognition of Jewish holidays (see page 13, *supra*) because the heritage of a single religious group is singled out for special mention. To say that government must acknowledge all religions whenever it mentions one simply makes no sense.

[17] Recently, the *Larson* "strict scrutiny" test was held to be inapplicable in a case involving an Establishment Clause challenge to a state's decision to permit a large, lighted cross to be erected on state park lands. *ACLU* v. *Rabun County*, 698 F.2d 1098, 1109 n.20 (11th Cir. 1983). The court noted that "no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religion other than Christianity in state parklands" (*ibid.*), and concluded that the absence of such evidence rendered the *Larson* test inapplicable. Here, too, the record contains no evidence of petitioners' refusal to acknowledge the special occasions marked by other religious groups; on the contrary, the Mayor of Pawtucket testified to his willingness to display a menorah as part of the City's annual holiday celebration (J.A. 104).

"must have a secular legislative purpose"; (2) must have a "principal or primary effect * * * that neither advances nor inhibits religion"; and (3) "must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). And petitioners have demonstrated that Pawtucket's practice fits comfortably within that test (see Pet. Br. 24-41).[18] We suggest, however,

---

[18] The constitutionality of government-sponsored nativity scenes has been adjudicated by other courts under the three-part test. In *Citizens Concerned for Separation of Church & State* v. *City & County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981), the court upheld Denver's nativity display which, like that of petitioners, is part of an annual Christmas celebration. The court found that the display, including the creche, had a secular legislative purpose (*id.* at 1311), that it was "not an endorsement by the City of the Christian faith, but rather one of general celebration of the holiday season" (*id.* at 1315), and that no entanglement problems were present (*ibid.*).

In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court reviewed the federal government's participation in the annual Christmas Pageant of Peace, held each year on the Ellipse. The court ruled that the Pageant had a secular purpose (*id.* at 68-70), and that the inclusion of a creche had no more than a "remote and incidental effect" on religion (*id.* at 70-74). Nevertheless, the court held that the government's participation in the Pageant would have to be restructured because its association with the Pageant's co-sponsor, a private, non-profit corporation that included professional clerics on its board, had engendered excessive administrative entanglements. In particular, the government had become involved in conflicts among representatives of various religious groups represented on the board (*id.* at 74-75).

In response to the *Allen* decision, the Pageant of Peace has been restructured. The Pageant itself no longer includes a nativity scene in its display, but the National Park Service issues demonstration permits (see 36 C.F.R. 50.19) to private

that the three-part test (just like the strict scrutiny test) results in analytic overkill when applied to the type of government action under consideration here. As already noted, the Court has long assumed that syllogistic doctrinal analysis is unnecessary for the validation of certain traditional aspects of American public life even when these carry unmistakably religious overtones. The Court recently stated in another context, in applying the four-part test for determining whether an implied cause of action had been created by a particular statute, that "there is no need for us to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 388 (1982), quoting *California* v. *Sierra Club*, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in the judgment). Here, too, there is no need to "trudge through" the three parts of the *Lemon* test when it is clear that the challenged practice is not among the evils against which the Establishment Clause was directed.

Moreover, application of the three-part test to traditional, ceremonial activities of the type involved in this case tempts courts to engage in hypocrisy. It should not be necessary for a court to assert that the traditional religious references that fill American official life have lost all religious sig-

---

groups that display a variety of religious symbols, including a nativity scene and a menorah, in areas adjacent to the Pageant. The present arrangement, which has never been challenged, is consistent with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). See also *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (rejecting Establishment Clause challenge to a Papal Mass conducted on the Mall under permit from the Park Service).

nificance in order to uphold them. This Court's sessions are opened by the traditional cry, "God save the United States and this honorable Court." Are we to say that the constitutional *validity* of this plea *depends* on it being wholly perfunctory, a piece of meaningless boilerplate? The fact that some—maybe many—actually understand this to be a plea for God's blessing should not force us to the unwelcome and unnecessary conclusion that the plea must be silenced. Similarly, a rigid application of the "secular purpose" inquiry should not force us to change our national motto from "In God We Trust" to "E pluribus unum" (an alternative considered and rejected by Congress). See H.R. Rep. No. 1959, *supra*, at 2. As we have demonstrated, it was never the purpose of the Framers to secularize government activities to the extent suggested by a literalistic and wooden reading of the *Lemon* language. The creche is one of the traditional symbols of a national holiday. It also retains religious significance. Courts should not be required to distort our past by pretending that such symbols have been "sanitized" by loss of all their religious meaning, so that it is now "safe" to display them.

Similarly, the "effect" component of the *Lemon* test seems excessive and even unworkable in the present context. It should not be necessary, for example, for courts to receive the testimony of a parade of psychologists, sociologists and philosophers, offering their subjective opinions on the "effect" of viewing religious symbols in particular contexts (see J.A. 71-90; 115-119; 122-124; 140-144), before reaching the conclusion that displays such as Pawtucket's do not constitute an establishment of religion.

Finally, as the court of appeals itself recognized (Pet. App. A12), the "excessive entanglement" inquiry is of limited utility here. In *Lemon*, the Court was concerned with the sort of administrative entanglement that might accompany financial support for parochial schools (403 U.S. at 619). No such problems arise when government acknowledges religion as a constituent part of our heritage. In fact, the district court in this case acknowledged the absence of administrative entanglement (Pet. App. A71); however, it stated that the challenged practice had caused "political divisiveness" because the City's ownership and display of the nativity scene had led to "anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol" (*id.* at A71, A72). The court of appeals was unwilling to place much weight on this determination (*id.* at A12), and rightfully so. If divisiveness is to be the test, then no religious symbol can withstand attack so long as the attack is mounted with sufficient fervor and publicity. In fact, the record here shows that there was no divisiveness at all until the filing of this lawsuit, less than a week before Christmas (J.A. 99, 105).

**In summary, this Court should recognize expressly, as it has implicitly in the past, that the Establishment Clause does not prevent government from marking our public holidays in a manner that includes traditional references to and acknowledgments of their religious character.**

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

J. PAUL MCGRATH
*Assistant Attorney General*

PAUL M. BATOR
*Deputy Solicitor General*

CAROLYN B. KUHL
*Deputy Assistant Attorney General*

KATHRYN A. OBERLY
*Assistant to the Solicitor General*

WILLIAM G. COLE
*Attorney*

JUNE 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 408888 19